



[4410-05OP]

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR part 540

[Docket No. BOP-1177I]

RIN 1120-AB77

Video Visiting and Telephone Calls Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act

AGENCY: Bureau of Prisons, Department of Justice.

ACTION: Final rule.

SUMMARY: The Bureau of Prisons amends its regulations to provide inmates in federal custody with the opportunity for free video-teleconferencing and telephone usage during the national emergency with respect to Coronavirus Disease 2019.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 353-8248.

SUPPLEMENTARY INFORMATION: On March 13, 2020, the President of the United States declared that a national emergency existed with respect to the outbreak of the novel coronavirus, SARS-CoV-2, known as Coronavirus Disease 2019 (COVID-19). Proclamation 9994 of March 13, 2020, 85 FR 15337 (Mar. 18, 2020), *available at* <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>. In the Coronavirus Aid, Relief, and

Economic Security (CARES) Act, Congress provided that, during the emergency period beginning on the date the President declared a national emergency with respect to COVID-19 and ending on the date 30 days after the date on which the national emergency declaration terminates, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau of Prisons (Bureau), the Director of the Bureau shall promulgate a regulation regarding the ability of inmates to conduct visitation through video teleconferencing and by phone, free of charge to inmates. *See* CARES Act, Public Law 116-136, § 12003(c)(1), 134 Stat 281, 618 (2020) [HR 748].

On April 6, 2020, the Attorney General authorized the Bureau of Prisons to exercise this authority under the CARES Act. The CARES Act also exempted these regulations from the requirement of public notice and comment in the Administrative Procedure Act, 5 U.S.C. 553. *See id.* § 12003(c)(2).

The final rule amends Title 28 of the Code of Federal Regulations, part 540, to add new § 540.106, Video Visiting and Telephone Calls Under the CARES Act. Section 540.106 establishes that during the covered emergency period, when the Attorney General determines that emergency conditions will materially affect the functioning of the Bureau of Prisons, the Bureau may, on a case-by-case basis, authorize inmates to conduct visitation through video teleconferencing and telephonically, free of charge to inmates, notwithstanding provisions in part 540 to the contrary.

As a general matter, the Attorney General has authorized the Director of the Bureau of Prisons to exercise or perform any of the authority, functions, or duties conferred or imposed upon the Attorney General by laws relating to the commitment, control, or treatment of persons charged with or convicted of offenses against the United States. *See* 28 CFR 0.96.

The final rule also indicates that access to video and telephone visitation will only occur consistent with logistical and security provisions in this subpart to ensure Bureau safety, security and good order and protection of the public, and may be modified, terminated, or reinstated during the emergency period based upon a determination by the Director, as designee of the Attorney General, regarding the level of material effect that emergency conditions continue to have on Bureau of Prisons functions. Further, misuse of Bureau systems or technology may result in communication restrictions and/or disciplinary action under 28 CFR part 541, and inmates are advised that they may challenge the Bureau's decisions under this section through the Bureau's administrative remedy program under 28 CFR part 542.

REGULATORY ANALYSES

Executive Orders 12866, 13563, and 13771

This final rule has been drafted and reviewed in accordance with Executive Orders 12866, 13563, and 13771. This final rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, it was not reviewed by OMB.

By way of background, the Bureau manages its own inmate telephone system (ITS). There are three components that make up the system and currently each has a different vendor: one provides software that facilitates the call processing and billing of the call; a second is the call carrier that transmits/facilitates the voice over internet protocol (VOIP) call outside the prison; and a third provides the software that maintains the inmate's account, digital call recording storage, and security settings.

The Bureau provides inmates with the option of placing direct dial; collect; and prepaid collect telephone calls via the ITS. Inmates housed in Bureau facilities normally pay the

following per minute rates for direct dial telephone calls to their called parties: Direct Dial - Local: \$0.06; Direct Dial - Long Distance: \$0.21; Direct Dial - Canada: \$0.35; Direct Dial - Mexico: \$0.55; and Direct Dial - International: \$0.99. If inmates place collect or prepaid collect calls, the called party will be charged applicable rates (not direct dial rates). Inmates at those facilities that provide video visitation normally pay a rate of \$6.00 for a 25 minute video session.

The volume of calls and video sessions by prisoners normally fluctuates during non-emergency situations. Inmates are ordinarily limited to calling 300 minutes per month, but the Bureau raised the limit to 500 minutes on March 13, 2020 in recognition of the impact of the COVID emergency to facilitate inmates' communication with their families. Furthermore, notwithstanding the preparation of this rule, the Bureau implemented no-cost calling for inmates on April 9, 2020, for the same reason. Based on recent inmate usage, the Bureau projects that free-of-charge phone calls for inmates will cost the Bureau approximately \$7 million per month during the COVID emergency and video sessions will cost approximately \$170,000 per month. These costs are being covered out of current Bureau of Prisons appropriations. The total cost of the regulation is uncertain, however, because the length of the emergency and its impact on Bureau operations is not predictable.

Even with that uncertainty, the expected benefits of the rule outweigh the cost for several reasons. First, the provision of free telephone and video visitation is a compassionate response to the COVID emergency. Enabling free visitation by alternatives means that prisoners are able to maintain contact with their families during the COVID emergency. Second, maintaining some form of visitation is a means of ensuring good order and discipline during the emergency, which benefits the safety of prisoners and staff. Third, expending resources on video and telephone

visitation benefits the health of prisoners and staff, as well as public health overall, during the emergency by limiting physical contact that could spread COVID. The Bureau has not identified any specific cost savings from the rule.

Executive Order 13132

This regulation will not have substantial direct effect on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, this regulation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Department of Justice certifies that this rule will not have a significant economic impact upon a substantial number of small entities because it pertains to the functioning of the BUREAU and funds authorized and appropriated for that purpose by Congress.

Unfunded Mandates Reform Act of 1995

This regulation will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This regulation is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This regulation will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment,

investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR part 540

Prisoners

Michael D. Carvajal

Director, Federal Bureau of Prisons

Under rulemaking authority vested in the Attorney General in 5 U.S.C. 301; 28 U.S.C. 509, 510 and delegated to the Director of the Bureau of Prisons in 28 CFR 0.96, 28 CFR part 540 is amended as follows:

1. The authority citation for 28 CFR part 540 is revised to read as follows:

Authority: 5 U.S.C. 301; 551, 552a; 18 U.S.C. 1791, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; Coronavirus Aid, Relief, and Economic Security Act, Sec. 12003(c).

2. In subpart I, add § 540.106 to read as follows:

§ 540.106 Video visiting and telephone calls under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

(a) During the “covered emergency period” as defined by the CARES Act with respect to the coronavirus disease (COVID-19), when the Attorney General determines that emergency conditions will materially affect the functioning of the Bureau of Prisons (Bureau), the Bureau

may, on a case-by-case basis, authorize inmates to conduct visitation through video teleconferencing and telephonically, free of charge to inmates, notwithstanding provisions in part 540 to the contrary.

(b) Access to video and telephone visitation will only occur consistent with logistical and security provisions in this subpart to ensure Bureau safety, security and good order and protection of the public.

(c) Access to video and telephone visitation under this section may be modified, terminated, or reinstated during the emergency period based upon a determination by the Director, as designee of the Attorney General, regarding the level of material effect that emergency conditions continue to have on Bureau functions.

(d) Misuse of Bureau systems or technology may result in communication restrictions and/or disciplinary action under 28 CFR part 541.

(e) Inmates may challenge the Bureau's decisions under this section through the Bureau's administrative remedy program under 28 CFR part 542.

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